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# Tradition, Policy and the Establishment Clause: Justice Kennedy's Opinion in *Town of Greece v. Galloway*

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**TRADITION, POLICY AND THE ESTABLISHMENT  
CLAUSE:**

**JUSTICE KENNEDY’S OPINION IN  
*TOWN OF GREECE V. GALLOWAY***

*Wilson Huhn* \*

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**I. INTRODUCTION**

In *Town of Greece v. Galloway*,<sup>1</sup> Justice Anthony Kennedy delivered the Supreme Court’s opinion which upheld a town board’s practice of inviting citizens of the town to deliver a ceremonial prayer to open the monthly board meetings.<sup>2</sup> Although almost all of the prayers were sectarian in the sense that they mentioned Jesus Christ, the Court specifically found that the town board permitted anyone to deliver the opening remarks and that the town’s non-discrimination policy made this practice constitutional under the provision in the First Amendment

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\* B.A. Yale University, 1972; J.D. Cornell Law School, 1977; Distinguished Professor and C. Blake McDowell, Jr., Professor of Law, University of Akron School of Law. I wish to thank the Akron chapters of the Jewish Law Students Association and the Federalist Society for inviting me to debate Professor Patrick Garry on this topic.

1. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding practice of Town Board in conducting a ceremonial prayer at the commencement of meetings of the board).

2. *Id.* at 1828.

prohibiting “the establishment of religion.”<sup>3</sup> In this Article, I discuss the role of tradition and policy in the context of this case and in the interpretation generally of the Constitution.

The great jurisprudential battle that has raged in the Supreme Court for nearly a century, and the question that our society has struggled with since the advent of the Civil War, is whether the Constitution is a command by our ancestors that we retain the same political structures, social hierarchies, and cultural traditions that they had; or, whether the Constitution reflects ideals of liberty, equality, fairness, and tolerance to which our ancestors aspired and to which they expected us to aspire.<sup>4</sup> That struggle between rules and standards, doctrine and principles, conventionalism and consequentialism, tradition and policy in the interpretation of the Constitution is played out again within Justice Kennedy's opinion in *Town of Greece v. Galloway*.

Professor Garry was right, and I was wrong, about how the Supreme Court would rule in *Town of Greece v. Galloway* and in the reasoning that Justice Kennedy would embrace in resolving that case.<sup>5</sup> As our distinguished guest predicted in our debate, the Supreme Court upheld the practice of sectarian Christian prayer conducted by the Town Board of Greece, and as he further predicted, Justice Kennedy utilized a “historical” mode of analysis justifying such prayers on the ground that local governments have traditionally engaged in the practice. Justice Kennedy seemingly overruled decades of Supreme Court jurisprudence that had interpreted the Establishment Clause by reference to the purpose and effect of the challenged state action; instead, Justice Kennedy appeared to elevate “custom” to be the primary determinant of constitutionality.

But all is not lost. Justice Kennedy's reliance upon custom, or “tradition,” as the principal touchstone of constitutional interpretation is tenuous. Although Justice Kennedy prepares his opinions with tradition, he always leavens them with policy. Justice Kennedy is not a reliable partner to Justice Antonin Scalia and the other conservative justices in

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3. See *id.* at 1816 (stating, “The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.”); *id.* at 1824 (stating, “So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”).

4. Compare *Dred Scott v. Sandford*, 60 U.S. 393 (1856) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. I participated in a debate with Professor Patrick Garry hosted by The University of Akron School of Law. After that debate, Professor Garry published a summary of his arguments. See generally Patrick M. Garry, *Prayer and the Meaning of the Establishment Clause: A Debate on Town of Greece v. Galloway*, 6 AKRON J. CONST. L. & POLY 1 (2015).

their attempt to “turn back the clock” to the days when intolerance was the norm and government was powerless to unseat privilege. While attentive to tradition in this case and others, Justice Kennedy ultimately bases his decisions upon the deeper meaning and ultimate purposes of the Constitution. Therein lies hope for the future.

This Article proceeds in five parts. Section II discusses Justice Kennedy’s balancing of tradition and policy in previous cases, while Section III discusses that balance in *Town of Greece v. Galloway*. Section IV argues that Justice Kennedy’s opinion is consistent with a rigorous understanding of separation of church and state in that the government may not dictate the content of official prayers. Section V argues that Justice Kennedy’s opinion is consistent with his position that offense taken in response to official prayers or religious displays is not constitutionally relevant. Finally, Section VI discusses the future of the neutrality principle.

## II. JUSTICE KENNEDY’S BALANCING OF TRADITION AND POLICY IN PREVIOUS CASES

In the field of fundamental rights, Justice Kennedy has repeatedly demonstrated that he is not beholden to tradition. In *Lawrence v. Texas*,<sup>6</sup> a case striking down a law that made homosexuality a crime, Justice Kennedy wrote, “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>7</sup> In *Michael H. v. Gerald D.*,<sup>8</sup> although concurring with the majority that under the circumstances the petitioner did not have a constitutional right to be recognized as the lawful father of the child, Justice Kennedy left open the possibility that such a right might exist in special circumstances. In that case, he joined Justice Sandra Day O’Connor’s concurring opinion, where Justice O’Connor warned the majority that it must not “foreclose the unanticipated” by adopting a strictly historical approach to constitutional analysis.<sup>9</sup> Most recently, in *United States v. Windsor*,<sup>10</sup> Justice Kennedy implicitly found that preserving traditional

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6. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down state law making same-sex intercourse a crime).

7. *Id.* at 572 (Kennedy, J.) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

8. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (denying petitioner’s claim to be the lawful father of a child born to a married woman).

9. *Id.* at 132 (O’Connor, J., concurring in part) (“I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”).

10. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down provision of federal law that refused to recognize same-sex marriages for purposes of federal law).

notions of marriage was not even a *legitimate* reason for the federal government to refuse to recognize the marriages of same-sex couples<sup>11</sup> and ruled that the federal Defense of Marriage Act was unconstitutional because of its unlawful purpose and effect.<sup>12</sup>

The tension between conformity to tradition and mindfulness of consequences was also evident in Justice Kennedy's recent opinion in *United States v. Alvarez*,<sup>13</sup> a First Amendment case in which the Supreme Court struck down the Stolen Valor Act, a federal statute that made it a crime to lie about having earned military honors. In his opinion for the Court, Justice Kennedy looked first to history, declaring that this type of law was not consonant with tradition:

The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.<sup>14</sup>

In defining and circumscribing that tradition, however, Justice Kennedy resorted to consequentialist analysis. Justice Kennedy noted that while many longstanding criminal laws make lying a crime, there is a crucial difference between those traditional kinds of laws and the Stolen Valor Act. The Stolen Valor Act, wrote Justice Kennedy, is different from perjury, fraud, and defamation because of the effects that flow from such speech. Justice Kennedy distinguished cases involving “defamation, fraud, or some other legally cognizable *harm* associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.”<sup>15</sup> In contrast, the Stolen Valor Act was not intended to redress a concrete harm visited upon individuals but, rather, sought to vindicate a widely-shared cultural belief that it is wrong to lie about having been awarded military honors. As Justice Kennedy pointed out,

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11. See *id.* at 2693 (Kennedy, J.) (stating, “The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married.”); Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor* at 28, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026 (stating, “multiple rational bases support Congress’ decision to retain the traditional definition of marriage for federal-law purposes”).

12. See *Windsor*, 133 S. Ct. at 2693-95 (Kennedy, J.) (identifying the unlawful purposes and effects of the federal law); *e.g.*, *id.* at 2693. Justice Kennedy states:

This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

13. *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (striking down federal Stolen Valor Act).

14. *Id.* at 2545 (Kennedy, J.).

15. *Id.* (emphasis added).

counterspeech is the proper remedy to redress that type of harm.<sup>16</sup> The problem with the Stolen Valor Act, ruled Justice Kennedy, was that it punished utterances regardless of the setting of the speech, the speaker's purpose, or the nature of the harms that were likely to result.<sup>17</sup> In short, while Justice Kennedy purported to invoke tradition in striking down the Stolen Valor Act, in reality he based his decision on the purpose and effect of the law.

So it is in *Town of Greece v. Galloway* as well. While upholding the practice of ceremonial prayer as consistent with our nation's traditions, Justice Kennedy nevertheless ruled that the constitutionality of the practice ultimately turns upon its purpose and effect.

### III. JUSTICE KENNEDY'S BALANCING OF TRADITION AND POLICY IN TOWN OF GREECE V. GALLOWAY

For over forty years, the Supreme Court has utilized consequentialist reasoning to define the parameters of the Establishment Clause. Throughout this period, the constitutionality of government action under the Establishment Clause has turned upon the actual intent and practical effect of such action. In *Lemon v. Kurtzman*,<sup>18</sup> a 1971 case authored by Chief Justice Warren Burger, the Court stated that, to be constitutional, the government's action must have both a secular intent and a primarily secular effect.<sup>19</sup> In 1989, in *County of Allegheny v. American Civil Liberties Union* ("Allegheny County"),<sup>20</sup> Justice Blackmun tweaked the *Lemon* test to mean that the government must not act with the intent to endorse religion, nor may the primary effect of the

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16. See *id.* at 2549 (stating, "The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest."); *id.* at 2550 (stating, "The remedy for speech that is false is speech that is true.").

17. See *id.* at 2547. Justice Kennedy stated:

Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

18. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state laws channeling public funds to religious schools).

19. *Id.* at 612-13 (citations omitted):

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

20. *Cnty. of Allegheny v. Am. Civil Liberties Union [ACLU]*, 492 U.S. 573 (1989).

law be to endorse religion.<sup>21</sup> Justice Kennedy dissented in *Allegheny County*<sup>22</sup> and in *Salazar v. Buono* in 2009,<sup>23</sup> and although he applied the “no endorsement” test, he signaled that he continued to doubt whether it was the proper test.<sup>24</sup> One of the closely watched questions in *Town of Greece v. Galloway* was whether Justice Kennedy would apply the “no endorsement” test or whether he would switch to a “tradition” test. Professor Garry correctly predicted that he would embrace the “tradition” test.

Tradition is the preferred interpretive mode of conservatives generally, for obvious reasons. Traditionally, same-sex couples could not marry;<sup>25</sup> traditionally, women were not eligible to attend military academies;<sup>26</sup> traditionally, capital punishment was not considered “cruel and unusual.”<sup>27</sup> Liberals, in contrast, usually utilize a policy approach to interpret the Constitution, such as the Equal Protection principle that “persons who are similarly situated must be treated alike”;<sup>28</sup> the understanding that the Due Process Clause guarantees “the opportunity to be heard at a meaningful time and in a meaningful manner”;<sup>29</sup> or the idea that the concept of liberty in the Fifth and Fourteenth Amendments

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21. See *id.* at 592 (stating, “In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.”).

22. See *id.* at 655-62 (Kennedy, J., concurring in the judgment in part and dissenting in part).

23. *Salazar v. Buono*, 559 U.S. 700 (2009) (remanding the case to the district court to permit it to determine whether the primary effect of the government’s action regarding the cross had been to endorse religion).

24. See *id.* at 720 (Kennedy, J.) (stating, “Even if, however, this standard were the appropriate one . . .”).

25. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (Kennedy, J.) (citing the House Report on the Defense of Marriage Act and stating, “The House Report announced its conclusion that ‘it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage’”); *id.* at 2707 (Scalia, J., dissenting) (stating, “As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms.”).

26. See *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting) (stating, “Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half . . . . It counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.”).

27. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 163 (1976) (ruling that the penalty of death for the crime of murder does not under all circumstances constitute “cruel and unusual punishment”).

28. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (stating, “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”).

29. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (stating, “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”) (citation omitted).

prohibits the government from interfering with an individual's "intimate and personal choices" concerning family life or bodily integrity.<sup>30</sup>

In *Town of Greece v. Galloway*, Justice Kennedy briefly rejected the "no endorsement" test in favor of the "tradition" test. In referring to *Allegheny County*, Justice Kennedy quoted the dissenters approvingly:

Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the "forthrightly religious" Thanksgiving proclamations issued by nearly every President since Washington.<sup>31</sup>

Justice Kennedy did not expressly overrule the result in *Allegheny County*, nor did he expressly state that the Establishment Clause permits the government to endorse religion. He did, however, proceed to analyze the constitutionality of the Town Board's practice by looking to tradition, and he found that "[t]he prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized."<sup>32</sup> Moreover, he did not analyze whether the ceremonial prayers had the purpose or effect of advancing, promoting, or endorsing religion.

However, there are portions of Justice Kennedy's opinion that preserve the "purpose" and "effect" prongs of the "no endorsement" test. Justice Kennedy repeatedly emphasized that prayers before official bodies are a form of "ceremonial prayer," intended to solemnize an occasion, and that if in practice the prayer deviates from this historical purpose it would become unconstitutional:

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. *If the course and practice*

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30. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). The Court stated:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)).

31. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821 (2014). (quoting *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989)).

32. *Id.* at 1824.



*over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.*

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. *Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not “exploited to proselytize or advance any one, or to disparage any other, faith or belief.”*<sup>33</sup>

Another legitimate purpose of ceremonial prayer that Justice Kennedy approves is to recognize members of the clergy for their contributions to the community:

The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its *purpose and effect* are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.<sup>34</sup>

Even though Justice Kennedy explicitly rejected the “no endorsement” test, he implicitly retained it. In effect, Justice Kennedy implicitly ruled that the official prayers in this case had neither the purpose nor the primary effect of endorsing religion, but rather were made to solemnize the occasion and to recognize religious leaders in the community. In future cases, if the plaintiffs can prove that the purpose and effect of an official prayer does not serve a legitimate purpose such as solemnization or recognition, then the prayer would be unconstitutional.

Furthermore, Justice Kennedy’s opinion invokes not only tradition but a principle that is consistent with the most rigorous understanding of separation of church and state – the necessity that the government must not dictate the content of prayers whatever the setting.

#### IV. THE GOVERNMENT MAY NOT DICTATE THE CONTENT OF OFFICIAL PRAYERS

The plaintiffs in this case did not contend that ceremonial prayers at

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33. *Id.* at 1823 (emphasis added).

34. *Id.* at 1827 (emphasis added).

all official functions are unconstitutional.<sup>35</sup> That option was foreclosed by the case *Marsh v. Chambers*,<sup>36</sup> in which the Supreme Court upheld the practice of a prayer to open legislative sessions.<sup>37</sup> This particular litigation strategy proved to be wise; in *Town of Greece v. Galloway*, not a single Justice of the Court voted to overrule *Marsh v. Chambers*.<sup>38</sup>

Instead the petitioners argued that the Town Board's prayer practice violated the Constitution because the Town Board had followed a consistent pattern of inviting Christian pastors who invariably delivered sectarian prayers.<sup>39</sup> The petitioners contended, and the dissenters found, that this pattern of conduct constituted official endorsement of one particular religion.<sup>40</sup> In particular, the petitioners suggested that the Town Board should have instructed its guest clergy to deliver nonsectarian prayers.<sup>41</sup>

The argument that the government is required to promote nonsectarian prayer was bound to lose. Justice Kennedy had expressed the opposing view vigorously and at some length in the 1992 case of *Lee v. Weisman*.<sup>42</sup> In that case, Justice Kennedy struck down a prayer that was offered at a high school graduation even though school officials had given careful guidelines to their guest, Rabbi Gutterman, and the Rabbi followed those guidelines and composed and delivered a wonderful

35. See generally Brief for Respondents at 19, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 5230742 (stating, "Petitioner and its amici seek to extend *Marsh* far beyond what it actually decided.").

36. *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding state legislature's practice of beginning legislative session with a chaplain's prayer).

37. See *id.* at 795 (upholding the "unbroken practice" of legislative prayer).

38. See *Galloway*, 134 S. Ct. at 1841-42 (Kagan, J., dissenting) (stating, "I agree with the Court's decision in *Marsh v. Chambers* upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer.").

39. Brief for Respondents, *supra* note 34.

40. See *id.* at 58 (defending the "endorsement" test against an "anemic version of the coercion test"); *Galloway*, 134 S. Ct. at 1841 (Breyer, J., dissenting) (stating, "Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith.").

41. See Brief for Respondents, *supra* note 34, at 18 (stating, "Petitioner does not ask its guest chaplains to avoid proselytizing or disparaging remarks, let alone to pray in an inclusive manner. With no instruction to do otherwise, petitioner's guest chaplains routinely offer prayers acceptable only to Christians."); Transcript of Oral Argument at 39-40, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696), 2013 WL 5939896. Attorney Douglas Laycock stated:

We think the town needs a policy. The policy should give guidelines to chaplains that say: Stay away from points in which believers are known to disagree. And we think the town should do what it can to ameliorate coercion. It should tell the clergy: Don't ask people to physically participate. That's the most important thing.

42. *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting prayer at public school graduation).

nonsectarian prayer.<sup>43</sup> Justice Kennedy stated that the fact that school officials sought to control the content of the prayer actually counted *against* its constitutionality.<sup>44</sup> Here is Justice Kennedy's explanation in *Lee v. Weisman* of the difference between the government's role in Freedom of Expression cases and Establishment Clause cases:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. *In religious debate or expression, the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all.* The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but *the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs, with no precise counterpart in the speech provisions.* The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that, *in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.* A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.<sup>45</sup>

According to Justice Kennedy, although it is perfectly constitutional for the government to express its own views on most subjects, the government is *not* permitted to express its opinion about matters of religion. In *Lee v. Weisman*, Justice Kennedy made it clear that the government could not cure a violation of the Establishment Clause by seeking to control the content of an officially-invited prayer. He said:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint.

... Though the efforts of the school officials in this case to find com-

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43. See *id.* at 581-82 (setting forth the facts of the case).

44. See *id.* at 588 (stating, "Principal Lee provided Rabbi Gutterman with a copy of the 'Guidelines for Civic Occasions,' and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers.").

45. *Id.* at 591-92 (emphasis added).

mon ground appear to have been a good faith attempt to recognize the common aspects of religions, and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. And these same precedents caution us to measure the idea of a civic religion against *the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated, and none favored*. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.<sup>46</sup>

In essence, Justice Kennedy takes the position that if prayer is allowed in an official setting, then the government may not interfere with its content. All people have the right to express their own religious views in a manner consistent with their own faith tradition. This includes people who are invited to deliver ceremonial prayers at the opening of official functions.<sup>47</sup> In light of Justice Kennedy's position on this question, there was no chance of persuading him that the problem with the prayers uttered before the meetings of the Town Board of Greece was that they praised Jesus. In his opinion in *Town of Greece v. Galloway*, Justice Kennedy stated:

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.<sup>48</sup>

Justice Kennedy's position in this case is consistent with the oft-quoted language from Justice Robert Jackson's opinion in *West Virginia State Board of Education v. Barnette*:<sup>49</sup>

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstanc-

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46. *Id.* at 589-90 (emphasis added).

47. See, e.g., Program, Swearing-In Ceremony for President Barack H. Obama: Fifty-Seventh Inaugural Ceremonies (Jan. 21, 2013), available at <http://www.inaugural.senate.gov/swearing-in/event/barack-obama-2013> (listing the Invocation by Myrlie Evers-Williams and the Benediction by The Reverend Dr. Luis Leon).

48. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014).

49. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

es which permit an exception, they do not now occur to us.<sup>50</sup>

The concept that the government is powerless to interfere with the content of prayers is consistent with another persistent theme of Justice Kennedy's jurisprudence – that purely subjective objections to other people's conduct are not a constitutionally sufficient reason to prohibit people from engaging in that conduct.

#### V. OFFENSE TAKEN IN RESPONSE TO OFFICIAL PRAYERS OR RELIGIOUS DISPLAYS IS NOT CONSTITUTIONALLY RELEVANT

Another consistent precept that Justice Kennedy has followed is that purely moral considerations are not sufficient to justify a legal obligation or prohibition. Justice Kennedy applied this principle in a string of significant cases to strike down laws discriminating against gays and lesbians.<sup>51</sup> More broadly, the Supreme Court has repeatedly recognized that a bare desire to harm a class of persons,<sup>52</sup> mere disagreement with an idea,<sup>53</sup> irrational fear of a group of people,<sup>54</sup> or moral disapproval of certain conduct,<sup>55</sup> without more, are not sufficient under the Constitution to justify laws treating groups of people differently or restricting human liberty.

In the context of the Establishment Clause, this means that just because someone objects to an official prayer or a religious display on public property does not mean that the prayer or display is

50. *Id.* at 642.

51. *See* *Romer v. Evans*, 517 U.S. 620 (1996) (Kennedy, J.) (striking down state constitutional provision precluding the adoption of laws prohibiting discrimination on the basis of sexual orientation); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

52. *See, e.g.,* *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (striking down federal law intended to prevent “hippies” from qualifying for food stamps, and stating, “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

53. *See, e.g.,* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down state law making it a crime to desecrate a venerated object as applied to a person who burned the American flag in protest, and stating, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

54. *See, e.g.,* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (stating, “[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”).

55. *See, e.g.,* *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (stating, “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”) (citation omitted).

unconstitutional. The Establishment Clause is not violated because a person is offended by an official prayer or a religious display on public land, nor is it violated because a person does not hold the same religious belief that is being expressed by the government. Here is what Justice Kennedy said about “offense” in his opinion for the majority in *Town of Greece v. Galloway*:

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion.<sup>56</sup>

The purpose of the Establishment Clause is not to protect us from religious messages we disagree with. Its purpose is to protect us from the unification of church and state. A person could *love* the religious message that the government is sending and still object to it on the ground that the government has violated the Establishment Clause by expressing that view. When the courts enforce the Establishment Clause, they are not protecting religious dissenters or minority religions – that is the protection afforded by the Free Exercise Clause. Instead, the Establishment Clause protects *every* citizen against the grave threat of official religion.

Justice Kennedy’s position on this point is consistent with the position of the Court in Freedom of Expression, Equal Protection, and Right to Privacy cases. Just as moral outrage is not a legitimate reason to deny same sex couples the right to marry<sup>57</sup> or the right of a protestor to burn the American flag,<sup>58</sup> it is also irrelevant in determining whether the government has violated the Establishment Clause.

The essence of a violation of the Establishment Clause is that the government has taken a position on a religious question or is interfering with the internal governance of a religious organization or has allowed a religious institution to exercise some sort of governmental power in a manner that advances its religion. Just as government may not dictate the content of prayers, so it may not take a position on any question of religion. It is unconstitutional for the government to say that God exists; and it is equally unconstitutional for the government to say that God does *not* exist.

The concept that the government may not take a position on religious questions leads us to the final portion of this essay wherein I discuss a question that Justice Kennedy does *not* address – in my opinion, the most important issue in the field of Freedom of Religion –

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56. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

57. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

58. *See Johnson*, 491 U.S. at 414.

and that is whether the Constitution requires that the government must remain neutral in matters of religion.

## VI. WHAT IS THE FUTURE OF THE NEUTRALITY PRINCIPLE?

The first words of the First Amendment – the first words of the Bill of Rights – protect Freedom of Religion:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .<sup>59</sup>

These two clauses, the Establishment Clause and the Free Exercise Clause, must be read in tandem. As noted above, until now the Supreme Court has interpreted the Establishment Clause to mean that the government may not advance, promote, or endorse religion.<sup>60</sup> In addition, the Court has interpreted the Free Exercise Clause to mean that the government may not intentionally hinder or interfere with the exercise of religion.<sup>61</sup> For nearly 70 years the Supreme Court has recognized the principle that the government must remain *neutral* with respect to religion. Many of our greatest justices have emphasized that the neutrality principle is at the core of Freedom of Religion:

Justice Hugo Black, *Everson v. Board of Education* (1947):<sup>62</sup>

[The First] Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.<sup>63</sup>

Justice Tom Clark, *School District of Abington Township v. Schempp* (1960):<sup>64</sup>

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the

59. U.S. CONST. amend. I.

60. See *supra* notes 41-44 and accompanying text.

61. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (striking down municipal ordinance prohibiting the ritual slaughter of animals).

62. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upholding government-subsidized transportation of children to both public and parochial schools).

63. *Id.* at 18 (Black, J.) (emphasis added).

64. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (ruling that Bible readings and recitation of the Lord's Prayer in public school were unconstitutional).

State is firmly committed to a position of *neutrality*.<sup>65</sup>

Justice David Souter, *McCreary County v. Kentucky ACLU* (2005):<sup>66</sup>

The touchstone for our analysis is the principle that the “First Amendment mandates governmental *neutrality* between religion and religion, and between religion and nonreligion.” When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious *neutrality*, there being no *neutrality* when the government’s ostensible object is to take sides.<sup>67</sup>

Justice Scalia has expressly and emphatically rejected both the “no endorsement” test and the neutrality principle.<sup>68</sup> In his view, the government does not have to remain neutral with respect to religion, and it is perfectly constitutional for the government to advance, promote, or endorse religion.<sup>69</sup>

In *Town of Greece v. Galloway*, Justice Kennedy favors a “tradition” approach over the “no endorsement” test. But he does not even mention the “neutrality” principle, which has until now been the lodestone for interpretation of the Religion Clauses.<sup>70</sup>

I am hopeful that Justice Kennedy and a majority of the Court will continue to support the principle that the government must remain neutral on questions of religion. I find support for this in Justice Kennedy’s statement that the Town Board’s practice would have been unconstitutional if the purpose and effect of the ceremonial prayer had been something other than to solemnize the occasion;<sup>71</sup> in his implication that people’s agreement or disagreement with the content of

65. *Id.* at 226 (Clark, J.) (emphasis added).

66. *McCreary Cty. v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (ruling display of Ten Commandments in county courthouse unconstitutional).

67. *Id.* at 860 (Souter, J.) (emphasis added).

68. *See id.* at 889 (Scalia, J. dissenting):

With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that “the First Amendment mandates governmental neutrality between . . . religion and nonreligion,” and that “[m]anifesting a purpose to favor . . . adherence to religion generally,” is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words.

69. *See id.* at 891 (stating that the government may take action “undertaken with the specific intention of improving the position of religion”); *id.* at 893 (suggesting that the government can “favor” one monotheism over polytheism and atheism in the public acknowledgement of religious belief); *id.* at 894 (suggesting that it is only unconstitutional if the government endorses a “particular religious viewpoint”).

70. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014). *See* cases cited *supra* notes 61–66 and accompanying text.

71. *See Galloway*, 134 S. Ct. at 1823.



a religious message is irrelevant in determining the constitutionality of government action under the Establishment Clause;<sup>72</sup> and in his observation that the government has no power to censor prayers that are uttered in official settings.<sup>73</sup>

## VII. CONCLUSION

This was a close case; a hard case. It turned principally upon a question of fact: did the Town Board of Greece give people of all faiths a fair opportunity to solemnize the proceedings before the Town Board in an act of ceremonial prayer or its secular equivalent? Reasonable people disagreed on that question of fact, and a majority of the Court resolved that issue in favor of the Town Board.

Reasonable people may differ, as they did in this case, on the proper application of the neutrality principle. But the principle itself is enduring. The founders of this country did not struggle and sacrifice to preserve a specific tradition of official prayer, but rather for the overarching principle that the government must always remain neutral towards religion.

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72. *Id.*

73. *Id.*